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No. 85-1571

Supreme Court, U.S.
FILED
JUL 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

JEFFREY R. MACDONALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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28 pp

QUESTIONS PRESENTED

1. Whether the district court judge should have recused himself under 28 U.S.C. 455 from presiding over petitioner's trial and post-conviction proceedings.

2. Whether a government psychiatrist deliberately elicited information from petitioner in violation of his Sixth Amendment right to counsel.

3. Whether the government deliberately withheld exculpatory evidence from the defense.

4. Whether the district court properly denied petitioner's motion for a new trial on the basis of newly discovered evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 779 F.2d 962. The opinions of the district court (Pet. Supp. App. SA1-SA15, SA16-SA107[1]) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1985. A petition for rehearing was denied on January 27, 1986 (Pet. App. A10). The petition for a writ of certiorari was filed on March 25, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The Supplemental Appendix omits seven pages of the district court's opinion denying petitioner's motions for post-trial relief. Where necessary, therefore, we will cite to that portion of the opinion as it is reprinted in the joint appendix filed in the court of appeals in this proceeding.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted on one count of first degree murder and two counts of second degree murder, in violation of 18 U.S.C. 1111. He was sentenced to three consecutive terms of life imprisonment. After his conviction became final,[2] petitioner filed a motion for a new trial pursuant to Fed. R. Crim. P. 33 on the basis of newly discovered evidence, as well as two motions for postconviction relief under 28 U.S.C. 2255 and a motion to recuse the district court judge under 28 U.S.C. 144 and 455. The district court denied the motions (Pet. Supp. App. SA1-SA15, SA16-SA107, SA108), and the court of appeals affirmed (Pet. App. A1-A9).

1. In the early morning of February 17, 1970, while petitioner was serving as an Army Medical Corps captain and assigned to Fort Bragg, North Carolina, petitioner's wife and two daughters were bludgeoned and stabbed to death in his military quarters. Petitioner summoned the Military Police and, during a series of interviews, he gave the investigators his account of what had occurred on the night of the murders. He told the investigators that a band

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[2]The road to final judgment in this case was a tortuous one. Before trial, petitioner moved to dismiss the indictment on the ground that his rights under the Sixth Amendment Speedy Trial Clause had been violated. The district court denied his motion, but the court of appeals reversed and ordered the indictment dismissed. 531 F.2d 196 (1976). This Court vacated the court of appeals' judgment on the ground that petitioner could not take an interlocutory appeal from the district court's denial of his motion to dismiss the indictment on speedy trial grounds. 435 U.S. 850 (1978). Following petitioner's trial, the court of appeals reversed petitioner's convictions on the ground that his right to a speedy trial had been violated. 632 F.2d 258 (1980). This Court reversed and remanded the case to the court of appeals for disposition of the remaining issues. 456 U.S. 1 (1982). On remand, the court of appeals affirmed, 688 F.2d 224 (1982), and this Court denied certiorari. 459 U.S. 1103 (1983).

of four "hippies" had broken into his house, stabbed him, and assaulted the other members of his family. He described the intruders as including a black male wearing an army field jacket, and two white males. He said that they were accompanied by a blond-haired female who wore muddy boots, a floppy hat, carried a candle, and chanted "acid is groovy; kill the pigs." 456 U.S. 1, 3-4 (1982). Based on physical evidence from the murder scene, the government at trial sought to show that petitioner's version of the events was false and that he had murdered all three members of his family by himself (456 U.S. at 4 n.2; Pet. Supp. App. SA17-SA18, SA55-SA66).[3]

a. Before trial, Helena Stoeckley, a drug addict and a member of the local "hippie" community, made a series of statements that appeared to link her to the crimes and to corroborate petitioner's story. On each occasion, however, she either contradicted her admission or qualified it, by stating that she could not recall her whereabouts at the time of the murders or by stating that her account of the events on the night of the murders was the product of drug-induced hallucinations. Pet. Supp. App. SA19, SA67-SA71; 688 F.2d 224, 230-231 (1982).[4] At petitioner's trial, Stoeckley was called as a defense witness. She repeated her earlier statements that she had no recollection concerning her whereabouts at the time of the murders, she denied any involvement in the offenses, and she admitted that her knowledge of the crimes was based on what she had heard on radio news bulletins and what others had told her (456 U.S. at 4 n.1; Pet. Supp. App. SA20, SA71-SA74). The

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[3]The evidence against petitioner is set forth in some detail in the Brief for the United States (at 3-7) filed with this Court in No. 80-1582.

[4]"Tr." refers to the trial transcript. "C.A. App." refers to the joint appendix filed in the court of appeals in this proceeding. "H. Tr." refers to the transcript of the hearing on petitioner's motions for postconviction relief.

district court refused to admit Stoeckley's earlier statements concerning her possible involvement in the murders under Fed. R. Evid. 804(b)(3) as statements against her penal interest. The court held that that Stoeckley's earlier statements lacked the clear indicia of trustworthiness required by the Rule. Tr. 5806-5807; see also 485 F. Supp. 1087, 1091-1093 (E.D.N.C. 1979).[5]

Following his conviction, petitioner retained private investigators to conduct a further investigation of his case and, specifically, to examine the possible involvement of Stoeckley and several of her male companions in the murders (Pet. Supp. App. SA20). During the course of their investigation, one of the investigators obtained additional statements from Stoeckley, which indicated that she may have participated in the murder of the MacDonald family. She subsequently recanted some of these statements, explaining that they were based upon dreams rather than a positive recollection of what had occurred on the night of the murders. See, *e.g.*, Pet. Supp. App. SA74-SA84; C.A. App. 914-916. Petitioner's investigators also obtained statements from others to the effect that they had observed persons matching petitioner's descriptions of the intruders in the vicinity of Fort Bragg shortly before or after the murders, or that persons resembling Stoeckley's known male companions had made statements suggesting their involvement in the crimes (*e.g.*, Pet. Supp. App. SA87-SA96; C.A. App. 190, 212-213, 479, 481-484). Finally, the investigators obtained, through Freedom of Information Act (FOIA) requests, various documents from the government's case files.

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[5]The court of appeals upheld the district court's ruling on the ground that, because Stoeckley was "an inherently unreliable witness," the district court's ruling was well within its discretion (688 F.2d at 233; see Pet. App. A3-A4).

b. On the basis of this material, petitioner filed a motion in April 1984, seeking a new trial on the basis of newly discovered evidence, pursuant to Fed. R. Crim. P. 33. In addition, he filed two motions for postconviction relief under 28 U.S.C. 2255. One motion alleged that the government had deliberately withheld exculpatory information that petitioner had discovered pursuant to his FOIA requests.[6] Petitioner's second motion claimed that a government psychiatrist who, pursuant to a court order, had examined petitioner during trial was actually a government investigator and had obtained statements from petitioner in violation of his Fifth Amendment privilege against compulsory self-incrimination and his Sixth Amendment right to counsel. Petitioner also filed a motion, pursuant to 28 U.S.C. 144 and 455, seeking the recusal of the trial judge, the Honorable Franklin Dupree, from further participation in the case. The motion was based upon the claim that Judge Dupree's former son-in-law, Jimmie C. Proctor, had participated in the prosecution of the case while he was an Assistant United States Attorney for the Eastern District of North Carolina.

3. Before ruling on petitioner's motions for a new trial, Judge Dupree denied petitioner's recusal motion (Pet. Supp. App. SA1-SA15). Judge Dupree stated he was unaware of Proctor's involvement in this case at the time he became a judge, and that he and Proctor had never discussed the case (*id.* at SA3). Judge Dupree also found that, despite Proctor's belief that petitioner was responsible for the murders and Proctor's unsuccessful attempts to have

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[6]That information included the allegation that a bloody syringe was allegedly found at the MacDonald residence by investigators; that a skin fragment was discovered under Mrs. MacDonald's fingernail during an autopsy, but was subsequently lost; and that investigators had been given a pair of muddy boots that were allegedly similar to petitioner's description of those worn by the female intruder.

the matter investigated by the United States Attorney's Office, Proctor's only role in the case was representing an FBI agent during the initial Article 32 investigation and assisting FBI and Army Criminal Investigation Division (CID) investigators during their reinvestigation (*id.* at SA9). Given Proctor's limited involvement in the matter, as well as the fact that Proctor was no longer a member of the U.S. Attorney's Office and had been divorced from Judge Dupree's daughter for nearly seven years by the time of petitioner's trial, Judge Dupree concluded that no reasonable person would have doubted his impartiality (*ibid.*). Accordingly, Judge Dupree rejected petitioner's claim that he should have recused himself under 28 U.S.C. 144 or 455 from presiding over petitioner's trial.[7]

Judge Dupree also denied petitioner's other motions in an exhaustive opinion (Pet. Supp. App. SA16-SA107). The court rejected petitioner's claim that a psychiatrist retained by the government to examine him was, in fact, an investigative agent and that his questioning violated petitioner's Fifth and Sixth Amendment rights (*id.* at SA22-SA39). The court found no evidence to support that allegation, and it found no evidence that the prosecutors had furnished the psychiatrist with questions to ask petitioner or had used any information from the examination during the trial (*id.* at SA33, SA39). The court also rejected petitioner's claim that the government had suppressed exculpatory evidence (*id.* at SA40-SA54). The court found that the government had not deliberately suppressed any evidence, and that, in any

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[7]In the district court, petitioner also argued that Judge Dupree should have recused himself under 28 U.S.C. 455(b)(5)(ii), which requires a judge to disqualify himself when a close relative acts as a lawyer in the proceeding, and under Subsection (b)(5)(iii), which requires a judge to recuse himself if he is aware that a close relative has an interest that could be substantially affected by the outcome of the proceeding. See C.A. App. 56-62. Judge Dupree rejected both claims (Pet. Supp. App. SA12-SA13). Petitioner did not pursue these claims in the court of appeals, and we will not discuss them here.

event, there was an insufficient showing that the items at issue were exculpatory (*id.* at SA42, SA54). Finally, the court rejected petitioner's claim that he was entitled to a new trial on the basis of newly-discovered evidence, such as Stoeckley's post-trial statements and other evidence allegedly tending to corroborate her involvement and that of her male acquaintances in the murders (*id.* at SA54-SA106). The court credited Stoeckley's testimony at trial that she could not recall her whereabouts on the night of the murders (*id.* at SA104-SA105). In addition, the court found that neither Stoeckley's statements, nor those of other persons, would lead to a different result at a new trial (*id.* at SA104-SA106).

4. The court of appeals affirmed (Pet. App. A1-A9). The court rejected petitioner's claim that Judge Dupree should have disqualified himself because of his former relationship with Jimmy Proctor, on the ground that Proctor's divorce from Judge Dupree's daughter and his resignation from the United States Attorney's Office long before the trial of this case eliminated any taint that might otherwise have required Judge Dupree to recuse himself (*id.* at A2). The court of appeals also rejected petitioner's claim that he was entitled to a new trial on the basis of newly-discovered evidence. The court upheld the district court's conclusion that the evidence would not have produced a different result at a new trial, particularly in view of the strong circumstantial evidence showing that petitioner's account of the murders was false (*id.* at A4-A5). The court of appeals also rejected petitioner's claim that the government had deliberately suppressed exculpatory evidence at his trial. The court upheld the district court's rulings that the government had not deliberately suppressed any evidence and had acted "in complete good faith" (*id.* at A8). The court also agreed with the district court that the evidence at issue was not exculpatory (*ibid.*). Finally, the court rejected as "speculation"

petitioner's argument that the psychiatrist who examined him prior to trial was, in fact, a government investigator (*id.* at A9).

ARGUMENT

The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals, and it presents no significant legal issue. Both lower courts correctly rejected petitioner's fact-bound claims in comprehensive opinions on which we rely. Accordingly, review by this Court is not warranted.

1. Petitioner argues (Pet. 10-17) that Judge Dupree should have recused himself from presiding over both the trial and post-trial proceedings in this case because of his former son-in-law's involvement in the case. That claim lacks merit.

a. The facts relevant to this claim are the following: The Army formally charged petitioner with the murder of his family on May 1, 1970. Thereafter, the Army began a formal, pre-court-martial investigation, conducted by an investigating officer under Article 32 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 832. Proctor attended the hearings to represent the interests of the Department of Justice and the FBI. At the time of those proceedings, Proctor was married to Judge Dupree's daughter. At the close of the Article 32 proceedings, the investigating officer recommended that the charges against petitioner be dismissed, and the charges were ultimately dropped on October 23, 1970. Pet. Supp. App. SA2.

In December 1970, following petitioner's discharge from the Army, the Army Criminal Investigation Division (CID) examined allegations by petitioner's counsel that the Army had mishandled its earlier investigations and that Stoeckley

may have been involved in the murders. During the reinvestigation, Proctor acted as a liaison between the Department of Justice and the CID; in particular, he arranged for office space and he coordinated the discussions between CID investigators and FBI agents. C.A. App. 486, 491-492; see Pet. Supp. App. SA5-SA6. Although Proctor personally believed that MacDonald should be a suspect in the murders, and he unsuccessfully urged the incumbent United States Attorney to initiate an FBI investigation into the crime, Proctor had no control over the investigation (C.A. App. 485-486; see Pet. Supp. App. SA9 ("any statements [Proctor] may have made expressing this personal conviction appear to have fallen on deaf ears")).

Judge Dupree was appointed to the bench in December 1970 and was sworn in the following month (Pet. Supp. App. SA3). As a result, Proctor resigned his position as an Assistant United States Attorney on February 28, 1971, and thereafter had no connection with this case (*ibid.*). Between the time of Judge Dupree's appointment and Proctor's resignation, no investigation of the MacDonald family murders was conducted by a grand jury, the United States Attorney's office, the Department of Justice, or the FBI. Proctor and Judge Dupree's daughter were divorced on July 27, 1972, following a one-year separation. *Id.* at SA2 n.1; C.A. App. 484-488.

In June 1972, after having examined a report of the CID investigation, the United States Attorney informed the Justice Department that he was declining prosecution of petitioner. In August 1974, however, at the suggestion of the CID, an attorney of the Justice Department's Criminal Division, aided by an Assistant United States Attorney for the Eastern District of North Carolina, began a grand jury investigation to develop additional facts regarding the murders. The grand jury returned an indictment in January 1975 charging petitioner with the murder of his wife and

daughters. Judge Dupree was assigned the case for trial, which ultimately began in July 1979. Pet. Supp. App. SA3.

b. Petitioner claims that Judge Dupree should have recused himself from presiding over the trial.[8] However, petitioner did not raise that claim in the district court; there, he only sought to have Judge Dupree recused from any "further" participation in the case (see Pet. Supp. App. SA1). Moreover, petitioner did not raise his present claim in the court of appeals (see Appellant's Br. 15-19). Accordingly, he may not now press his claim that Judge Dupree should have recused himself from presiding over the trial. See, *e.g., United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, a conviction may not be set aside on this ground when the defendant does not raise the claim

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[8]Petitioner also maintains (Pet. 10, 14, 15) that it was improper for Judge Dupree to decide the recusal motion. Petitioner did not raise that issue in the district court or the court of appeals (see Appellant's Br. 15-19), and therefore he may not raise it now. See, *e.g., United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, that claim lacks merit. "Section 455 clearly contemplates that decisions with respect to disqualification should be made by the judge sitting in the case, and not by another judge. It requires the judge to *disqualify himself* when any one of the statutory conditions is met." *United States* v. *Balistrieri*, 779 F.2d 1191, 1202-1203 (7th Cir. 1985), cert. denied, No. 85-1653 (June 23, 1986) (emphasis in original). See also, *e.g., In re City of Houston*, 745 F.2d 925, 927 (5th Cir. 1984); *United States* v. *Cross*, 708 F.2d 631, 639 (11th Cir. 1983). This is because "[t]he challenged judge is most familar with the alleged bias or conflict of interest" and "[r]eferring the motion to another judge raises problems of administrative inconvenience and delay." *Chitimacha Tribe* v. *Harry L. Laws Co.*, 690 F.2d 1157, 1162 (5th Cir. 1982), cert. denied, 464 U.S. 814 (1983).

Even in the case of recusal motions under Section 144, the courts recognize that, as in this case, a district judge may rule on the threshhold question whether the allegations in the recusal affidavit are legally sufficient. See, *e.g., Berger* v. *United States*, 255 U.S. 22, 36 (1921); *United States* v. *Balistrieri*, 779 F.2d at 1199-1202.

until after trial. *United States* v. *Murphy*, 768 F.2d 1518 (7th Cir. 1985), cert. denied, No. 85-924 (Feb. 24, 1986); see *Marty's Floor Covering Co.* v. *GAF Corp.*, 604 F.2d 266, 268 (4th Cir. 1979), cert. denied, 444 U.S. 1017 (1980) (disqualification under 28 U.S.C. 144 is prospective only).[9]

The courts below also correctly rejected petitioner's claim that Judge Dupree should have recused himself under 28 U.S.C. 455(a).[10] Section 455(a) requires a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." The standard for determining whether there is an appearance of partiality under this subsection is "whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case." *Pepsico, Inc.* v. *McMillen*, 764 F.2d 458, 460 (7th Cir. 1985); see also, *e.g.*, *United States* v. *Balistrieri*, 779 F.2d 1191, 1204 (7th Cir. 1985), cert. denied, No. 85-1653 (June 23, 1986); *United*

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[9]Petitioner incorrectly asserts (Pet. 8, 13) that he was unaware of Proctor's relationship with Judge Dupree or Proctor's involvement in this case until he received the FOIA materials during the post-trial investigation. An affidavit executed by Proctor in connection with petitioner's recusal motion states that, prior to the murder of the MacDonald family, both he and his former wife were socially acquainted with Wade Smith, petitioner's local counsel, and that, while representing the Department of Justice at the Army's 1970 CID investigation, he had a confrontation with Bernard Segal, another attorney who represented petitioner. C.A. App. 485. Although petitioner may not have been aware of all of Proctor's activities in connection with the investigation of the murders, the information available to him was more than enough to put a reasonable person on notice of the basic facts of Proctor's role in the investigation (*Murphy*, 768 F.2d at 1540).

[10]Petitioner also relied on 28 U.S.C. 144, 455(b)(5)(ii) and (iii) in the district court (see Pet. Supp. App. SA4 n.4, SA10-SA14), but he did not pursue those claims in the court of appeals (see Appellant's Br. 15-19).

States v. *Murphy*, 768 F.2d at 1538; *Potashnick* v. *Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir.), cert. denied, 449 U.S. 820 (1980) (question is how the judge's "participation in a given case looks to the average person on the street"). In this case, no "disinterested observer" (*Pepsico, Inc.*, 764 F.2d at 460) aware of the pertinent facts would harbor a "significant doubt" (*ibid.*) as to Judge Dupree's impartiality in this case.[11]

Although Proctor personally believed that petitioner had murdered his family, and although he unsuccessfully sought to have petitioner prosecuted, Proctor never played any role in prosecution of petitioner's case. His only official function in the matter was to represent the Department of Justice during the Army's 1970 Article 32 investigation and to act as a liaison between the CID and the FBI in the course of the CID's 1970-1971 reinvestigation. Proctor's involvement during this case therefore occurred well before Judge Dupree was appointed to the bench. Pet. Supp. App. SA9. During that period, neither the Department of Justice nor the United States Attorney's Office was conducting an investigation. In fact, the incumbent United States Attorney expressly declined to permit his office to become involved in the investigation or to seek an indictment

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[11]To the extent that petitioner contends that Judge Dupree's bias is revealed by his evidentiary rulings, the short answer to that claim is that the court of appeals has upheld every one of Judge Dupree's challenged evidentiary decisions. The admissibility of Stoeckley's statement was litigated during a prior appeal, and the court of appeals upheld Judge Dupree's ruling on that issue. 688 F.2d at 230-234. Judge Dupree's rulings on petitioner's discovery motions were also litigated during the prior appeals in this case (see, *e.g.*, 79-5253 Defendant's Br. at 240-248), and were upheld by the court of appeals (531 F.2d at 209). Petitioner has also offered no factual support for his speculation (Pet. 13) that he would have learned of Proctor's involvement in the investigation if his discovery motions had been granted. Indeed, he has not even attempted to demonstrate that his discovery requests touched on that subject.

against petitioner (see C.A. App. 492-494, 506). When an indictment was returned in January 1975 and Judge Dupree was first called on to make any discretionary rulings in the case, Proctor had been out of the United States Attorney's office for four years and had been divorced from Judge Dupree's daughter for more than three years. And when the trial commenced in July 1979, Proctor had been away from the office for more than eight years and had been divorced from Judge Dupree's daughter for almost seven. Under these circumstances, the court of appeals correctly found that there was "no vestige of the taint requiring the trial judge to disqualify himself at the time of the trial in 1979 or at the time the post conviction motions came on for hearing in 1984" (Pet. App. A2-A3). See *S.J. Groves & Sons Co.* v. *International Brotherhood of Teamsters*, 581 F.2d 1241, 1246-1249 (7th Cir. 1978).

2. Petitioner also claims (Pet. 17-20) that a psychiatrist retained by the government to examine him prior to trial for the limited purpose of determining his mental state disclosed the results of that examination to the prosecutors, who thereafter used that information to cross-examine petitioner. Relying on *Maine* v. *Moulton*, No. 84-786 (Dec. 10, 1985), petitioner argues that the psychiatrist's examination violated his right to counsel.[12] That claim lacks merit.

At trial, petitioner moved for leave to introduce psychiatric testimony that he was mentally incapable of committing the murderous attack on his family. At the government's request, the district court ordered petitioner to submit to a psychiatric evaluation by psychiatrists of the government's choosing. The government selected Dr. Hirsch Silverman, a

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[12]In the courts below, petitioner also argued that the psychiatrist's examination violated his Fifth Amendment privilege against compulsory self-incrimination, but he has not presented that claim in this Court as a separate question. See Pet. i.

psychologist, and Dr. James Brussel, a forensic psychiatrist, who had previously been involved in the case on a limited basis. Drs. Silverman and Brussel examined petitioner outside the presence of his counsel. The district court thereafter denied petitioner's motion in order to avoid "a battle of experts" (485 F. Supp. at 1096; see 688 F.2d at 227-228; Pet. Supp. App. SA28). Accordingly, neither Dr. Brussel nor Dr. Silberman testified at trial.

There is no merit to petitioner's claim that the government used the results of Dr. Brussel's examination to cross-examine him at trial[13] or that Dr. Brussel served as an "investigating criminologist" in the government's camp (Pet. 18). Dr. Brussel was never debriefed by the prosecution, and his findings and conclusions were never reduced to writing (C.A. App. 1520-1522). In addition, as the district court found (Pet. Supp. App. SA36-SA39), the prosecutors had an independent source for the questions they asked petitioner on cross-examination. Moreover, Dr. Brussel's prior involvement in the case was minimal. The government investigators had consulted with Dr. Brussel more than eight years prior to the trial to obtain his advice concerning the psychological characteristics, possible motives, and identities of the murderers of the MacDonald family, as well as the direction that their further investigation should

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[13]Dr. Brussel's examination of petitioner by itself did not violate petitioner's right to counsel. Once a defendant intends to present psychiatric testimony in his defense at trial, he may be compelled to undergo an examination by a government psychiatrist in the absence of counsel. See, *e.g.*, *Taylor* v. *Best*, 746 F.2d 220, 223 (4th Cir. 1984), cert. denied, No. 85-5185 (Nov. 12, 1985); *United States* v. *Byers*, 740 F.2d 1104 (D.C.Cir. 1984) (en banc); *Vardas* v. *Estelle*, 715 F.2d 206, 208-212 (5th Cir. 1983); see also *Estelle* v. *Smith*, 451 U.S. 454, 465-466 (1981) (collecting cases). Acordingly, there would have been no violation of petitioner's right to counsel unless the government used the results of Dr. Brussel's examination at trial.

take (C.A. App. 470, 1584-1585).[14] Under these circumstances, the district court found that "there is no evidence that the prosecution enlisted Dr. Brussel as an investigative agent, gave him questions to ask MacDonald, debriefed him following the examination, or used any information from the examination against MacDonald during trial" (Pet. Supp. App. SA33). The court of appeals upheld that finding (Pet. App. A8-A9). Given these concurrent findings by the lower courts, further review of petitioner's fact-bound claim is not warranted. See, *e.g.*, *United States* v. *Doe*, 465 U.S. 605, 614 (1984); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982).[15] Accordingly, there is no factual basis to petitioner's claim that Dr. Brussel's examination violated his Sixth Amendment rights.[16]

3. Petitioner also claims (Pet. 21-26) that the government failed to disclose several items of exculpatory evidence to the defense prior to trial. Both courts below, however,

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[14]Dr. Brussel became involved in the case in February 1971 when the CID investigators sought his opinion concerning the possible identities of the killers. Based on information given him by the CID investigators, Dr. Brussel stated that petitioner's account of the crime appeared to be false, but he added that petitioner's falsehood did not mean that petitioner had committed the murders. Pet. Supp. App. SA23, SA34.

[15]Petitioner asserts (Pet. 18) that he was unaware of Dr. Brussel's prior involvement in the case until he received documents from the government under the FOIA in 1983. The district court found, however, that the defense was on notice of Dr. Brussel's earlier involvement by April 1971, when a CID agent furnished Dr. Brussel's name to petitioner's defense counsel as one of the government's experts who would review petitioner's psychological tests. Pet. Supp. App. SA33.

[16]Petitioner also contends (Pet. 19) that the district court relied upon a report prepared by Dr. Brussel in denying his motion to present psychiatric evidence. However, Dr. Brussel never prepared a report following his examination of petitioner (C.A. App. 1520); the only psychological report that the government furnished to the district court was prepared by Dr. Silverman. The government submitted that report in connection with its opposition to petitioner's post-trial motion for bail. See C.A. App. 20.

found that the government did not deliberately suppress the items at issue and that, in any event, none of the items was exculpatory (Pet. App. A6-A8; Pet. Supp. App. SA42-SA54). See *United States* v. *Bagley*, No. 84-48 (July 2, 1985). Those concurrent findings do not warrant further review. We will, however, briefly summarize the facts that are pertinent to each of petitioner's claims.

a. Petitioner claims that the government withheld the fact that an Army investigator discovered a bloody syringe in the MacDonald home shortly after the murders. The only indication that such an item was ever found, however, was contained in the hearsay report of an investigator who had summarized the observations reported to him by persons who had inventoried a closet in the MacDonald home (Pet. App. A6; Pet. Supp. App. SA44; C.A. App. 1219); the investigators who actually inventoried the closet stated that no such syringe was discovered (Pet. App. A6; Pet. Supp. App. SA45). The district court thus properly concluded that the investigator's second-hand report was insufficient to establish that the syringe ever existed (Pet. Supp. App. SA45). Petitioner has also failed to show that the syringe would have constituted exculpatory evidence, even if it had been shown to have existed (*id.* at SA45-SA46).

b. In January 1971, Betty Garcia, the landlady of Cathy Perry, a young woman residing in Fayetteville, N.C., gave her attorney some property, including a pair of beige boots, that had belonged to Perry. The property was then turned over to the CID in the presence of Captain James Douthat, an attorney who had represented petitioner during the Army's Article 32 investigation (Pet. Supp. App. SA47-SA49).[17] The boots were examined for bloodstains or debris

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[17]Contrary to petitioner's assertion (Pet. 21), the district court found (C.A. App. 1938 (this portion of the district court's opinion is not reprinted in the Supplemental Appendix to the Petition)) that there was

that might connect them with the murders. When nothing was found, the items were returned to Ms. Garcia (Pet. App. A6). As the courts below found (Pet. App. A7; C.A. App. 1937, 1938-1941),[18] the boots turned over to the CID did not fit the description of the boots worn by the female intruder in petitioner's story. Because there was no evidence linking the boots to the murders, the government acted properly in returning them to Ms. Garcia because they were plainly of no exculpatory value.[19]

c. During the autopsy, a small fragment of what appeared to be human skin was discovered under Mrs. McDonald's fingernail (C.A. App. 1377, 1423, 1941).[20] Sometime between February 28 and December 19, 1970, the skin fragment was apparently lost (*id.* at 1942). Thereafter, the CID unsuccessfully attempted to locate the missing skin particle by examining the vials containing the fingernail scrapings. An autopsy report and the pathologist's testimony during the Article 32 investigation showed that the skin particle had been discovered during the procedure, and a laboratory report stated that the vials did not contain any skin particles. All the reports were furnished to the defense during the

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no bloody clothing included in the property turned over to the CID. That finding is supported by the property receipt that was signed by Captain Douthat (C.A. App. 1301).

[18]This portion of the district court's opinion is not reprinted in the Supplemental Appendix to the Petition.

[19]In addition, Captain Douthat, who was present when the boots were given to the CID, subsequently assisted the defense during pretrial preparations (C.A. App. 1692). Petitioner therefore had ready access to information concerning the boots, and his claim must fail for that reason as well. See *United States* v. *Dean*, 722 F.2d 92, 95 (5th Cir. 1983) (no *Brady* violation when accused has access to information and could obtain it himself by exercising due diligence).

[20]This portion of the district court's opinion is not reprinted in the Supplemental Appendix to the Petition.

pretrial discovery process. Pet. Supp. App. SA50; C.A. App. 1942-44.

As the Court explained in *Trombetta* v. *California*, 467 U.S. 479, 488-489 (1984) (footnote omitted), "[w]hatever duty the Constitution imposes on the [government] to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, * * * evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." As both courts below concluded (Pet. App. A7; Pet. Supp. App. SA49-SA50), there is no evidence that the skin particle, even if available at the time of the trial, would have exonerated petitioner. In fact, since petitioner had scratch marks which looked as though " 'somebody had dug their fingernails into his chest' " (Pet. Supp. App. SA50 (quoting Tr. 1413)), the skin particle "may very well have belonged to [petitioner]" (Pet. Supp. App. SA49; Pet. App. A7). Although the loss of the skin particle is regrettable, this case is akin to *Trombetta*, in which the government "did not [lose the particle] in a calculated effort to circumvent the disclosure requirements established by *Brady* v. *Maryland* and its progeny." 467 U.S. at 488.[21]

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[21]We also note that petitioner was furnished copies of both the autopsy report, revealing the initial discovery of the skin particle, and the laboratory report, disclosing that the examination of vials containing the debris scraped from beneath Mrs. MacDonald's fingernails during the autopsy failed to reveal the presence of skin particles. Accordingly, the defense was on notice of both the discovery and the loss (Pet. Supp. App. SA50). Petitioner's assertion to the contrary notwithstanding (Pet. 23), he was in a position to exploit these developments by challenging the manner in which the government investigated the case and processed the evidence, had he wished to do so.

d. In April 1971, a CID investigator, seeking to obtain Stoeckley's fingerprints, took a series of photographs of the wall of a room of her apartment in Nashville, Tennessee. Some of the photographs revealed the presence of an upper case "G" as part of various words that had been painted on the wall, apparently with Stoeckley's finger. In a handwritten note, the investigator observed that the letter seemed to resemble the "G" in the word "PIG" that had been written in blood on the headboard of a bed in the master bedroom in the MacDonald residence, ostensibly by one of the intruders. Pet. App. A7; Pet. Supp. App. SA51. Although the photographs of the wall were furnished to the defense prior to trial, the investigator's observation concerning the possible resemblance of the "G" to the one discovered on the headboard was not included in his typed report, a copy of which accompanied the photographs (Pet. App. A8; Pet. Supp. App. SA51-SA52).

As both courts below found (Pet. App. A8; Pet. Supp. App. SA52), the fact that the government failed to provide the defense with the investigator's speculations concerning the possible significance of the letter "G" is inconsequential, because petitioner has failed to demonstrate that this evidence was exculpatory. In fact, an FBI crime laboratory report that was produced when petitioner raised the issue during the post-trial proceedings states that neither the "G" on the wall of the apartment nor the "G" on the headboard contained the " 'inherent characteristics essential to . . . meaningful comparison' " (Pet. Supp. App. SA53 (citation omitted)). Moreover, the investigator who took the photographs also expressed the view that the "G"s in the apartment resembled those in petitioner's military notebooks (Pet. App. A8; Pet. Supp. App. SA52).[22]

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[22]Petitioner also maintains (Pet. 22-23 & n.7) that the government concealed the fact that it had destroyed the negatives of seven photographs of fingerprints taken inside the MacDonald home, which he

4. Petitioner's final claim (Pet. 26-28) is that he is entitled to a new trial on the basis of newly-discovered evidence uncovered during the post-trial investigation, particularly the statements by Stoeckley. That evidence, however, was meticulously canvassed by the trial judge (Pet. Supp. App. SA74-SA98), who concluded that it did not raise a reasonable doubt of petitioner's guilt (*id.* at SA103-SA106). Because there is an ample evidentiary basis for that finding (*id.* at SA55-SA67) and there are no extraordinary circumstances that merited intervention on appeal, the court of appeals properly sustained the district court's finding (Pet. App. A4-A5). Further review is not warranted. See, *e.g.*, *United States* v. *Johnson*, 327 U.S. 106, 111-113 (1946).

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claims could have shown that intruders had entered it. This claim lacks merit. In the first place, during the hearing on the post-trial motions, petitioner abandoned the claim that he was prejudiced by the destruction of the fingerprint negatives. See C.A. App. 1927 n.8; I H. Tr. 23. As a result, the issue was never addressed by the courts below. In any event, the negatives were discarded because they were so badly blurred that they were of no value for purposes of identification or comparison (C.A. App. 391-392). Thus, the government's failure to apprise the defense of the existence of the negatives and of their destruction could not have adversely affected his defense.

Petitioner also argues that the government suppressed evidence that law enforcement authorities considered Stoeckley to be a valuable informant. However, petitioner was well aware of that fact, because there was testimony at trial that Stoeckley was often used by the police as an informant. See 688 F.2d at 231.

Finally, petitioner notes (Pet. 23-24) that Stoeckley admitted participating in the murders during a television interview, and he criticizes the government for objecting at trial to the introduction of her confessions. Because Stoeckley's interview did not take place until 1982, however (C.A. App. 2852), her statements during the interview could hardly have been introduced (or objected to) during petitioner's 1979 trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1986

DOJ-1986-07